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Rennold Pender v. Romney Lumber Co. et al : Brief of Respondent

Utah Supreme Court

Marr, Wilkins & Cannon; Richard H. Nebeker; Attorneys for

No. 8469

IN THE SUPREME COURT
of the
STATE OF UTAH

RENNOLD PENDER,
Plaintiff and Appellant,

— vs. —

BOARD OF EDUCATION OF SALT LAKE CITY, a public corporation, et al.
Defendants and Respondents.

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

The Supreme Court of the State of Utah and the Supreme Court of the United States have both ruled directly on the controlling principle of law which sets at rest any factual matters claimed to be involved by appellant. The trial court properly granted the Board of Education's motion for summary judgment on the basis of *Railroad vs. Stringham,* 38 Utah 113, 110 P. 868, and *Gonzales vs. French* 164 U.S. 338, 17 S. Ct. 102 41 L.

Ed. 458. These cases were cited below in defendant's written brief but appellant has not mentioned them to this court.

The statement of facts set forth by appellant is incomplete but correct as far as it goes. The land involved herein is a ten acre tract lying in the Northeast Quarter of Section 16, Township 1 South, Range 1 East, Salt Lake Meridian, and being situated west of 19th East Street and north of Kensington Avenue in Salt Lake City. The issue is whether or not the land was reserved to the Territory of Utah for school purposes under the Organic Act of 1850, so that title thereafter passed to the State of Utah upon its admission to the Union under the Enabling Act of 1894.

Defendant holds title under a patent from the State of Utah (Abstract entries No. 25 and 83) while plaintiff's recent application for federal patent was rejected. (R. 50-52) Plaintiff is the remote successor in interest of an early settler who, plaintiff contends, was possibly in possession as early as 100 years ago and that the preemptive right of such settler has continued in effect to the present day and now compels the State of Utah to select other lands "in lieu" of this particular tract. For the convenience of the court, counsel for the defendant has prepared a summary of the abstract which is entitled "Chain of Title" and is filed at pages 62 and 63 of the Judgment Roll.

The most pertinent fact which plaintiff refrains from stating is that none of his predecessors in interest

ever filed a declaratory statement under the pre-emption laws of intention to obtain patent from the U.S.A. (R. 50, 51) The federal statutory law of pre-emption upon which plaintiff relies makes such procedure a necessary prerequisite in order that the settler's possessory claim might be perfected and prevent title to the school lands involved from passing to the State of Utah.

The parties will be referred to as the plaintiff (Rennold Pender) and the defendant (Board of Education of Salt Lake City).

These parties are the only ones taking part in this appeal. Romney Lumber Company deeded its interest to the Board of Education (abstract entry No. 83) and has taken no further action in connection with the lawsuit. The Board of Education was substituted as a party defendant in place of Romney Lumber Company under Rule 25 (c) U.R.C.P. Salt Lake County was originally joined as a party defendant, but filed its Disclaimer. The State of Utah was made a third party defendant by Romney Lumber Company, but the issues framed by such pleadings have become moot in view of the Decree quieting the title of Board of Education of Salt Lake City.

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TITLE TO THE TRACT INVOLVED PASSED FROM THE FEDERAL GOVERNMENT TO THE STATE OF UTAH.

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ARGUMENT AND AUTHORITIES

POINT I.

TITLE TO THE TRACT INVOLVED PASSED FROM THE FEDERAL GOVERNMENT TO THE STATE OF UTAH.

Defendant agrees with all the law cited in plaintiff's brief to the effect:

> " . . . that if there is any genuine issue as to any material fact, the motion (for summary judgment) should be denied." Young et al. vs. Felornia, Utah, May 1952, 244 P. 2d 862, 863.

Plaintiff contends that there is an issue of fact as to when John Prye or D. Hendrix first settled on the land with a view to pre-emption. The official plat of the survey of Township 1 South, Range 1 East, Salt Lake Meridian, shows that it was filed with and accepted

by the Surveyor General for Utah on September 10, 1856. (R. 50, 51) On February 25, 1868 the Territorial Surveyor certified that "John Poy (or Prye) is the lawful claimant of Lots 16 and 17." (Abstract Entry No. 1) However the Big Field Five Acre Plat (R. 66) introduced into evidence by plaintiff states that it was:

> "copied from Old Plot by Leo Hawkins, G.S.L. Co. Recorder 1857"

and plaintiff claims that it is only reasonable to infer that the owner as shown thereon of Lots 16 and 17, Block 13 (D. Hendrix) was in possession prior to September 10, 1856, the date the official U.S. Survey was filed. Plaintiff argues about the condition of the weather in the fall of 1856, the meaning of the word "old" and asks this court to gloss over the fact that there is no deed of possession from D. Hendrix to John Prye. But for the purpose of sustaining the motion for summary judgment, plaintiff's claim that D. Hendrix is his earliest predecessor in title and that such person settled on the land with a view to pre-emption prior to September 10, 1856 may be assumed to be correct.

In any event the abstract shows: That by mesne conveyances the possessory interest of John Prye was transferred to George Saxton and C. S. Patterson; that in 1923 auditor's tax deeds to Salt Lake County were issued for 1918 delinquent taxes; that in 1923 Salt Lake County quitclaimed its interest to the State of Utah for "no money" inasmuch as the Board of County Commis-

sioners was advised that the property was "State Land erroneously assessed." (R. 70) In 1943 the State patented the property to Romney Lumber Company and in 1952 plaintiff acquired quitclaim deeds from the heirs of Saxton and Patterson. Plaintiff's complaint was filed May 6, 1952, two days before the one year grace period expired as provided for in the new four year statute of limitations on tax titles.

The solution to this case does not depend upon the date of earliest possession or any modern statute. It is governed by the provisions of the statutes concerning pre-emptive rights (Chapter 4, Title 32, Revised Statutes of 1878) and the decisions of the Supreme Courts of Utah and the United States construing the same. The law is explicit that:

> "Every claimant under the pre-emption law . . . is required to make known his claim in writing to the register of the proper land-office within three months from the time of the settlement . . ." Sec. 2265 Rev. Stat. 1878 (3 March 1843; 5 Stat. 620)
>
> "In regard to settlements which are authorized upon unsurveyed lands, the pre-emption claimant shall be in all cases required to file his declaratory statement within three months from the date of the receipt at the district land-office of the approved plat of the township embracing such pre-emption settlement." Sec. 2266, Rev. Stat. 1878 (30 May 1862, 12 Stat. 410)

As stated in the affidavit of Mr. Ernest E. House, Manager of the Bureau of Land Management, Land Of-

fice for Utah, the official tract book covering the Northeast Quarter of Section 16, Township 1 South, Range 1 East, shows that none of plaintiff's predecessors in interest ever filed an application for homestead entry or declaratory statement of pre-emptive claim. This affidavit is uncontroverted and under the two very pertinent decisions of *Railroad vs. Stringham* and *Gonzales vs. French,* the failure of the pre-emptive claimant to file his declaratory statement, caused the title to the section 16 tract, here involved, to be reserved to the Territory of Utah pursuant to the Organic Act of 1850. The possessory claim of John Prye was not diligently prosecuted and failed to ripen into any type of title which can now be asserted by plaintiff.

In the settlement scheme of the western states, the first settler upon the land who was the head of a family and who erected a dwelling house and improved and inhabited such premises had a preference right to purchase and acquire patent to 160 acres upon paying the prescribed fee and filing his claim under the pre-emption laws. (Chapter 4, title 32, Revised Statutes of 1878) The statutes establishing pre-emptive rights date back at least to March 3, 1803 (2 Stat. 229) and recognized the claim to possession of the first person to inhabit and improve the lands lying along the western frontier. The homestead entry may, but need not have been based on such prior inhabitation. The pre-emptive claimant was offered first chance to buy the land to protect his investments and improvements, etc.

In 1841, Congress re-enacted the laws on pre-emption and provided in section 10:

> " . . . no lands reserved for the support of schools . . . shall be liable to entry under and by virtue of the provision of this act." (Sept. 4, 1841, 5 Stat. 456)

This of course raised a problem, for the early pioneers were settling upon the land well in advance of any public survey and no one knew whether in fact they were located upon land which after government survey was accomplished might turn out to be section sixteen or thirty-six. In 1859 Congress passed a provision to alleviate this situation, but in the meantime the Territory of Utah was created by the Organic Act (9 Stat. 453; published at page 80, volume 1, U.C.A. 1953) Section 15 of this act provided:

> "That when the lands in the said Territory shall be surveyed under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same *are hereby, reserved* for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same."

On this same day Congress passed a similar statute which stated:

> "Sections numbered sixteen and thirty-six, in each township of the territories of New Mexico,

> Utah, Colorado, Dakota, Arizona, Idaho, Montana and Wyoming shall be reserved for the purpose of being applied to schools in the several Territories herein named, and in the States and Territories hereinafter to be erected out of the same." (9 Stat. 452; Sec. 1946, Rev. Stat. 1878)

Subsequently, in 1891 sections 2 and 32 in each township were added to this proviso (26 stat. 796; Republished in 43 U.S.C.A. Sec. 853.)

Also in 1891 (3 March 1891, 26 Stat. 1097) the laws on pre-emption (Chapter 4, Title 32, Rev. Stat. of 1878) were repealed except sections 2275, 2276 and 2286. This repealing act provided that all bona fide pre-emptive claims which had been initiated, may be perfected upon due compliance with law.

The act of July 16, 1894 (28 Stat. 107) was: "An act to enable the people of Utah to form a constitution and State government and to be admitted into the Union on an equal footing with the original States." Section 6 of this Enabling Act (published page 64, Vol 1, U.C.A. '53) provided:

> "That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed state, and where such sections, or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu

> of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: . . . "

On February 26, 1859 Congress passed the statutory provision concerning pre-emptive rights on school lands:

> "Where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors . . . " (26 Feb. 1859, 11 Stat. 385; Sec. 2275, Rev. Stat. 1878; slightly revised and republished in 43 U.S.C.A. Sec. 851)

Plaintiff's entire claim to title is based upon this provision; he contends that he is the successor of D. Hendrix, who settled on the land with a view to pre-emption.

To review the matter chronologically; the pre-emption law of 1841 reserved school lands from the operation of that act; in 1850 the Organic Act reserved Section 16 for school purposes in the Utah Territory; we assume (for the purpose of the motion for summary judgment)

that in 1855 D. Hendrix was a settler with a view to pre-emption who inhabited and improved the tract involved; in 1856 the official survey of the area was filed and accepted; hence at that time the location of the boundary lines of section 16 became known; in 1859 Congress provided for lieu land selections by the Territory where settlements with a view to pre-emption had been made on sections 16 or 36 before the survey of the lands in the field, and in 1843 and 1862 sections 2265 and 2266 respectively of the Revised Statutes of 1878 were passed which required the pre-emption claimant in all cases to file his declaratory statement within three months from the filing date of the township plat.

This is the identical sequence of events ruled upon in *Gonzales v. French,* decided by the Supreme Court of the United States in 1896, 164 U.S. 338, 17 S. Ct. 102 41 L. ed. 458. Emma Gonzales claimed to be the owner of a 120 acre tract forming part of section 16, T. 21 N., R. 7 E., of the Gila and Salt River Meridian (in Flagstaff, Arizona). The pertinent facts, as stated by the court, were:

> "In 1878 a survey in the field was made of the township in which the lands in dispute were situated, which survey, together with a plat of the same, was approved February 3, 1879. *At the time of the survey McMillan and Farriner were residing on and cultivating lands constituting a portion of section* 16, and in 1883 Emma J. Gonzales, the plaintiff in error, purchased from said

occupants their improvements, took possession of the land, and erected additional improvements thereon." (emphasis added)

Although this school section was reserved (but not granted) to the Territory, Congress in 1889 granted the South Half of Section 16, to probate Judge French to hold said lands as a townsite, in trust for the occupants of the town of Flagstaff. Mrs. Gonzales protested the action of the local land officers in allowing Judge French's entry and after fruitless appeals to the General Land Office and to the Secretary of Interior, she sued to quiet title in the courts. The U.S. Supreme Court held:

> "The claim of the plaintiff in error, therefore, to a right of pre-emption, was fatally defective because her vendors and predecessors in title had failed to make or file an actual entry in the proper land office. *As they did not choose to assert their rights by filing a declaratory statement, or by making an entry as pre-emptioners, their mere possession did not prevent the rights of the territory from attaching to the school sections when the survey was made.* Nor did the plaintiff in error lawfully succeed to any possessory rights they may have had, as against the United States, because such rights were merely personal to the settler, and, under U. S. Rev. Stat. Sec. 2263, were not assignable to the plaintiff in error. She did not herself, after taking possession, comply with the requisitions of the law.
>
> "Section 2265, Revised Statutes, provides that 'every claimant under the pre-emption law for land not yet proclaimed for sale is required to make known his claim in writing to the register

of the proper land office within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise his claim shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law;' and Sec. 2266 provides that 'in regard to settlements which are authorized upon unsurveyed lands, the preemption claimant shall be in all cases required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such pre-emption settlement;' and section 2267 provides that 'all claimants of pre-emption rights, under the two preceding sections, shall, when no shorter time is prescribed by law, make the proper proof and payment for the lands claimed within thirty months after the date prescribed therein, respectively, for filing their declaratory notice, has expired.'

"The bill discloses that the plaintiff in error first appeared in the land office and proposed to file her declaratory statement on April 2, 1885, more than six years after the filing of the plat.

"The register and receiver were therefore warranted in rejecting the claim of the plaintiff in error."

The above quoted decision conclusively bars plaintiff's complaint to quiet title. The principle therein announced was subsequently declared to be the law in Utah. In *Rio Grande Western Railway Company v. Stringham* et al., 38 Utah 113, 110 Pac. 868, the facts were as follows:

In 1870 George Stringham, and Dorr Curtis settled upon unsurveyed public lands west of Sandy, Utah. In 1873 the lands were surveyed and the plat was filed in the Land Office in August, 1874. In 1873 the Bingham Canyon and Camp Floyd Railroad built its road from Sandy to Bingham, and in 1875 and 1876, a copy of the articles of incorporation and a profile and map of the road were filed with the Secretary of the Interior. No declaratory statement announcing his intention to obtain patent under the pre-emptive laws was filed by Stringham untill 1883. Some time later the Rio Grande R. R. acquired the Bingham and Camp Floyd R. R. and a quiet title suit was prosecuted. The opinion states:

> "It is contended that the decisive questions on the appeal are: (1) Were the lands in question, and upon and across which plaintiff's predecessor constructed its road, public lands when it filed its articles of incorporation with the Secretary of the Interior, and its profile and map with the register of the district land office, and undertook to avail itself of the benefits of the act?"
>
> * * *
>
> "Curtis filed no declaratory statement, and made no entry in the land office. He sold his possessory rights to George Stringham in 1875. Stringham filed no declaratory statement, and made no entry in the land office until the 12th day of June, 1883. These claimants failing to assert their rights by the filing of a declaratory statement, or by making an entry as pre-emptors,

within the prescribed time after the receipt at the district land office of the township plat, acquired no prior rights by virtue of their settlement and occupancy, and their failure to file such declaratory statements left the lands subject to disposition by the United States as before their occupancy.

"The Supreme Court of the United States, in the case of *Buxton v. Traver,* 130 U. S. 232, 9 Sup. Ct. 509, 32 L. ed. 920, held that a settlement upon public lands in advance of a public survey is allowed to parties who, in good faith, intend, when the surveys are made and returned to the local land office, to apply for their purchase; and, when the public surveys are made and returned, the land, not having been in the meantime withdrawn, can be acquired and purchased by them by the filing of a declaratory statement within the time and by pursuing the steps prescribed by law. The court there said: 'If those steps are from any cause not taken, the proffer of the government has not been accepted, and a title in the occupant is not even initiated. The title to the land remains unaffected, and subject to the control and disposition of the government, as before his occupancy. This doctrine has been long established in this court.' To the same effect are Northern Pac. Ry. Co. v DeLacey, 174 U.S. 622, 19 Sup. Ct. 791, 43 L. ed. 1111; Gonzales v. French, 164 U. S. 338, 17 Sup. Ct. 102, 41 L. ed. 548; Osborne v. Altschul (C.C.), 101 Fed. 739. We therefore say that the lands in question were public lands when plaintiff's predecessor, in 1875, filed its articles of incorporation with the Secretary of the Interior, and when the profile and

> map of its road were filed by it in the district land office, and approved by the Secretary of the Interior on the 20th day of October, 1876."

A landmark case concerning the necessity of the pre-emptive claimant filing a declaratory statement of intention to obtain patent is that of *Frisbie vs. Whitney,* 9 Wall. 187, 19 L. ed. 668. The holding of that case is that occupation and improvement of the public lands with a view to pre-emption does not confer a vested right in the land occupied, nor a right against the government. A vested right under the pre-emption laws is obtained only when the purchase money has been paid, and the receipt of the proper land officer given to the purchaser; and until this is done, such lands are under the control of Congress.

The only case which plaintiff cites and claims to be contrary to the above decisions is *Hamblin vs. State Board of Land Commissioners,* 55 Utah 402, 187 Pac. 178. In that case a survey in 1918 of lands near Kanab, Utah revealed that plaintiff Hamblin's improvements and cultivated acreage were on state, school lands. His predecessors in title had been there for forty years, so pursuant to Utah law (65-1-31 U.C.A. 1953) Hamblin had his Salt Lake attorney prepare an application to purchase his tract from the State Land Board. This application was delivered in the mail to Kanosh rather than Kanab which caused his subsequent application to be delayed and denied because not filed "within ninety days after the plats of said surveys have been filed in the

United States Land Office." Mr. Hamblin brought an original writ of mandamus in the Supreme Court of Utah to compel the granting of his tardy application.

This court held that the writ of mandamus would not lie to compel the Land Board to perform a discretionary function, inasmuch as the statute provided that the settler "may be permitted" to purchase such lands. Without any reference to its prior *Railroad v. Stringham* decision the court stated that the ninety days filing provision was the same as the federal requirement and that:

> "In construing the section of the act of Congress above quoted, (Sec. 2266 Rev. Stat. 1878) as far as we have been able to ascertain, the courts have uniformly held it to be directory only. *The cases in mind have all arisen between conflicting claimants, and where there were no intervening rights as in the case at bar.*" (Emphasis added)

Plaintiff deleted the last sentence, above italicized, from his brief, for the *Landsdale vs. Daniels* decision, 100 U. S. 113, 25 L. ed. 587, quoted in the Hamblin case states that a filing subsequent to the three month period:

> " . . . is held to be operative and sufficient *unless some other person had previously commenced a settlement and given the required notice of claim.* Johnson vs. Towsley, 13 Wall, 72, 91, 20 L. ed. 485, 489.

The *Johnson vs. Towsley* decision is cited with approval in *Gonzales vs. French* and these cases interpreted together say in effect that if intervening rights

should attach to the land the failure of the pre-emptive claimant to make his declaratory statement within the three month period, is fatal to perfecting the possessory right. Thus in the Hamblin case, there were no intervening rights and the three months proviso was stated to be directory and not mandatory while in *Gonzales vs. French* and *Railroad vs. Stringham* the title of the intervenor was held paramount to the unperfected pre-emptive claim.

The result is that where plaintiffs' predecessors in interest, D. Hendrix and John Prye et al., filed no declaratory statement whatsoever, the land, being a school section was reserved to the Territory of Utah under the Organic Act, the date the survey was filed (Sept. 10, 1856), and was granted to the State under section six of the Enabling Act of 1894. The State Land Board patented the property to Romney Lumber Company in 1943 and it was not until May 6, 1952 that Rennold Pender filed the first and only application that has ever been made with the Bureau of Land Management. This was 97 *years* after D. Hendrix was first (assumed to be) in possession. Because of such intervening rights this application was properly rejected and plaintiff has no better position before the courts.

As stated in *Gonzales vs. French*:

> "As they did not choose to assert their rights by filing a declaratory statement, or by making an entry as pre-emptioners, their mere possession

> did not prevent the rights of the territory from attaching to the school sections when the survey was made."

Similarly in *Ferry vs. Street,* 4 Utah 521, 11 Pac. 571, the Supreme Court of Utah said:

> "The decisions of the Supreme Court of the United States establish the following propositions of law: *First.* That the various acts of Congress mentioned reserving portions of the public lands of the United States to the territories or states for the benefit of their people, *vest the title of such lands so reserved in the territories or states when the lands are surveyed,* or when they are bounded and ascertained." (4 Utah at page 537)

Other decisions which hold that title to the school section is reserved to the Territory once the survey is accomplished are *Dugan v. Montoya,* 24 N. Mex. 102, 173 Pac. 118; *Union Pacific R. Co. v. Douglas,* 31 Fed. 540; *Union Pacific R. Co. v. Karges,* 169 Fed. 459; *Magnolia Petroleum Company v. Price,* 86 Okla. 105, 206 Pac. 1033.

The lands involved in the instant action were reserved to the Territory of Utah under section 15 of the Organic Act (see page 8 of this brief), and granted to the state under section 6 of the Enabling Act (July 16, 1894; 28 Stat. 107). No other conclusion can be reached. The fact that other settlers did file the required declaration of intent, and received federal patent to other portions of section 16, T. 1 S., R. 1 E., only shows that compliance with the pre-emption requirements was rewarded

with legal title but in cases of non-compliance the state was not required to make lieu selections and its patent was valid.

A further study of the laws on pre-emption show that a pre-emptive right to obtain patent was *personal* and such right could not be assigned or transferred. Sec. 2259 of the Revised Statutes (1878) states:

> "Every person, being the head of a family . . . who has made, or hereafter makes, *a settlement in person* on the public lands subject to pre-emption, and who inhabits and improves the same . . . " (is entitled to a pre-emptive right) (4 Sept. 1841; 5 Stat. 455)

Section 2262 of the pre-emption laws provides that the claimant must take an oath:

> " . . . that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use . . . " (4 Sept. 1841; 5 Stat. 456)

In section 2258 it is declared that lands shall not be subject to rights of pre-emption that are:

> " . . . actually settled and occupied for purposes of trade and business, and not for agriculture." (4 Sept. 1841; 5 Stat. 455)

The law is explicit that no assignment of the pre-emptive right may be made.

Sec. 2263:

> "Prior to any entries being made under and by virtue of the provisions of section 2259, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the Secretary of the Interior; *and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void.*" (Emphasis added) (4 Sept. 1841; 5 Stat. 456).

See the language in *Gonzales vs. French* that an assignee has no standing as a pre-emptive claimant. It might just as easily be assumed that John Prye was informed by the officials of the District Land Office that the land was a known school section, and he being an assignee could not succeed in obtaining patent to said tract.

The court can readily understand why the Bureau of Land Management rejected plaintiff's application for patent where he was not the original personal settler upon the lands, but is an assignee, and an extremely remote one at best.

Furthermore, plaintiff has admitted, pursuant to defendant's request that he is the owner of more than 320 acres of land in the State of Utah. (R. 45, 46) Sections 2260 and 2262 (Rev. Stat. 1878) declare that a person shall not be eligible to obtain a pre-emptive right:

> " . . . who is the proprietor of three hundred and twenty acres of land in any state or territory."

POINT II.

PLAINTIFF'S APPLICATION FOR PATENT FROM THE UNITED STATES OF AMERICA WAS REJECTED BY THE BUREAU OF LAND MANAGEMENT AND THIS ADMINISTRATIVE DECISION IS BINDING UPON PLAINTIFF AND UPON THIS COURT.

On May 6, 1952 the same date the complaint was filed, plaintiff prosecuted an application to obtain a patent from the United States of America. This application was rejected.

The affidavit of Mr. House (R. 50, 51) states that on July 9, 1952 Mr. Pender was notified of the decision of the Bureau of Land Management, rejecting his application for patent, *and that no appeal was taken from such decision.* A copy of the letter notifying Mr. Pender that the lands had been granted to the State of Utah as a school section is attached to Mr. House's affidavit. (R. 52)

The Rules and Regulations of the Bureau of Land Management provide as follows:

> Section 221.50 (b) "Upon failure to serve and file notice of appeal as provided in Sections 221.47 to 221.49 the case will be closed."
>
> Section 221.51 (a) "When any party fails to move for a new trial or to appeal from the decision of the manager within the time specified, such decision shall, as to such party, be final and will not be disturbed except in case of fraud or gross irregularity."

These regulations are published in 43 Code of Federal Regulations and are required to be judicially noticed. 44 U.S.C.A. Sec. 307. See also 78-25-1, U.C.A. '53.

By virtue of the last-above regulations the administrative action of the Bureau of Land Management in rejecting plaintiff's application for patent is binding upon the plaintiff and upon this court. This principle of administrative law has been widely recognized by the courts and is stated in *Gonzales vs. French* as follows:

> "The bill discloses that the plaintiff in error first appeared in the land office and proposed to file her declaratory statement on April 2, 1885, more than six years after the filing of the plat.
>
> "The register and receiver were therefore warranted in rejecting the claim of the plaintiff in error. And, at any rate, as she did not appeal from their decision to the Commissioner of the General Land Office, she must be deemed to have acquiesced therein, and is concluded thereby so long as it remains unreversed. Wilcox v. Jackson, 38 U.S. 13 Pet. 511 (10:270)."

The above stated rule was also cited with approval by the Supreme Court of Utah in *Railroad v. Stringham,* 38 Utah, at 120:

> "We think that the Secretary of Interior, when he received and accepted the articles of incorporation of plaintiff's (railroad) predecessor, and approved the profile of its road filed with the register of the District Land Office, determined the question now under consideration. By

> such acceptance and approval, the Secretary necessarily determined that the act did apply. *This is not a proper proceeding nor forum to review that ruling.*" (Emphasis added.)

Other decisions which announce the rule that an administrative determination upon the facts cannot be reviewed in a court of law are *U.S. v. Throckmorton,* 98 U.S. 61, 25 L. ed. 93; *Ross v. Day,* 232 U.S. 110, 34 S. Ct. 233, 58 L. ed. 528; *Johnson v. Riddle,* 240 U.S. 467, 36 S. Ct. 393, 60 L. ed. 752; *Reed v. St. Paul M. & M. Ry. Co.,* 234 Fed. 207; *Pierson v. State Board of Land Com'rs.,* 14 Idaho 159, 93 Pac. 775 and *Ross v. Wright,* 29 Okl. 186, 116 Pac. 949. For a very interesting and unusual application of the rule concerning the binding effect of a decision of the Bureau of Land management see *In Re Wo-Gin-Up's Estate,* 57 Utah 29, 192 Pac. 267.

Mr. House, having custody of the official tract book which showed no pre-emptive claim ever having been entered, ruled upon the basis of such fact that plaintiff's contention of pre-emptive right could not possibly operate in any manner to upset the sale of the tract by the Sate Land Board under its regular procedure. There has been no allegation seeking relief against fraud or mistake. No appeal having been taken by plaintiff from the rejection of his application, the decision of the department is conclusive upon him.

POINT III.

PLANTIFF CANNOT OBTAIN TITLE TO THE SCHOOL SECTION BY ADVERSE POSSESSION AGAINST THE UNITED STATES OR THE STATE OF UTAH.

The following cases are cited to button up any contention that plaintiff might have some factual basis to title on the theory of adverse possession, or other such grounds for reversal of the decree quieting the school board's title.

It is axiomatic that title by adverse possession cannot be acquired against the United States. *Jourdan v. Barrett,* 4 How. 169, (U.S.) 11 L. Ed. 924; *Gibson v. Chouteau,* 13 Wall 92, (U.S.) 20 L. ed. 534; *Bode v. Rollwitz,* 60 Mont. 481, 199 Pac. 688; *Boglino v. Giorgetta,* 20 Colorado Appeals 338, 78 Pac. 612; *United States v. Eldredge,* 33 F. Supp. 337.

And in *Van Wagoner v. Whitmore,* 58 Utah 418, 199 Pac. 670, the Supreme Court of Utah held that title by adverse possession could not be acquired to a school section as against the state. The following headnote correctly reflects the adjudication of that case:

> "Title to land granted to the state by the Enabling Act (Act Cong. July 16, 1894), for the support of the common schools in the state, cannot be acquired by adverse possession as against the state under Comp. Laws 1917 § 6446, 6447, 6449, 6450 (seven year statute of limitations on adverse possession) in view of section 10 of the Enabling Act, and in view of Const. Art. 10, § 3, Art. 20 § 1, though the state sold the land under

> section 5575, such statutes of limitation having no application to land granted by Congress for the support of common schools."

On page 18 of his brief, plaintiff infers that he has been an adverse holder of this tract of land for more than 20 years. The brief states that plaintiff: ". . . can, of course, proceed under Section 1068 United States Code Annotated, as amended (Title 43) to secure title . . ." This act provides that the Secretary of the Interior shall issue a patent:

> ". . . whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation."

Plaintiff has never been in possession, or held this land in good faith for any length of time whatsoever. He has never placed valuable improvements on such land nor cultivated one square foot of it. See plaintiff's Answers To Defendant's Request For Admission Of Facts at page 45 and 46 of the Judgment Roll. Plaintiff goes so far as to contend that his residence at 672 Milton Ave. somehow means in a broad sense that he "*inhabits*" this tract.

Since the date of the issuance of state patent to Romney Lumber Company, it has paid all taxes assessed

against the property (R. 33) and has paid for all curb, gutter, sidewalk and sewer improvements that have been made. So far as defendant's counsel is informed, said property is vacant.

POINT IV.

THE STATE PATENT TO ROMNEY LUMBER COMPANY AND PAYMENT OF TAXES BY IT BARS PLAINTIFF FROM OBTAINING TITLE BY ADVERSE POSSESSION AGAINST SAID PATENTEE.

Just in case plaintiff contends that he has acquired title by adverse possession against Romney Lumber Co. since the state patented the property to it in 1943, defendant has had Ensign Abstract Company prepare a certificate under date of September 23, 1955, which report of the assessment and payment of general taxes for the years 1943 to 1954 shows that all taxes and special assessments have been paid by Romney Lumber Company. (R. 53 to 60 inclusive.)

Section 78-12-7, U.C.A. 1953, provides:

> "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law; . . ."

Hence the patentee, Romney Lumber Company, must be presumed to have been in possession since the date of patent August 7, 1943.

Furthermore, section 78-12-12 U.C.A. 1953 states:

> "In no case shall adverse possession be considered established under the provisions of any section of this Code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors *have paid all taxes which have been levied and assessed upon such land according to law.*" (Emphasis added.)

Defendant Board of Education of Salt Lake City has only cited these statutes and presented an abstract of the assessment rolls showing payment of all taxes by Romney Lumber Company to show to the court that there is no possible issue of fact concerning the establishment of title by adverse possession by plaintiff. Neither Rennold Pender, nor his predecessors in interest could have acquired title by adverse possession against either of the sovereign titleholders, the United States of America or the State of Utah, and the payment of taxes by defendant's grantor precludes the possibility of acquisition of title by adverse possession against the individual patentee of the State of Utah.

CONCLUSION

Assuming all facts as claimed by plaintiff, no issues are thereby raised, not disposable under the pre-emption laws. The motion for summary judgment was properly granted and the decree quieting defendant's title should

be affirmed by this court. The summary judgment procedure contained in the new rules has provided an expedient means of disposing of vexatious litigation.

Equitably speaking, Emma Gonzales and Thomas B. Stringham stood in a far better position than the plaintiff herein. But it has been a policy of the law from earliest times that an *enfeoffment* of some sort be required to indicate in whom the fee simple was vested. Here the very practical and necessary act was to timely file a declaratory statement of pre-emptive claim in the district land office. The failure to do so, was, no doubt, costlier to Gonzales and Stringham than in the instant case. There can be no question about the outcome of this action in view of the decisions in those two cases.

The Decree should be affirmed with costs awarded to this respondent.

Respectfully submitted,

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